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No. 82-276

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND L. DIRKS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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The Commission files this supplemental brief to correct two significant misstatements of fact made in petitioner's reply brief.

1. Petitioner misstates the record in asserting twice (Reply Br. 7, emphasis supplied; *id.* at 9) that a Commission staff attorney argued before the Commission that "when Dirks learned of the allegations of fraud at Equity Funding he *should* have done 'nothing'." In fact, the transcript of the oral argument before the Commission shows that while the Commission's attorney said that petitioner "*could* have done nothing" about the evidence of fraud that he had obtained, he argued that petitioner "*should* have reported it to the New York Stock Exchange" (emphasis supplied):

> [SEC] COMMISSIONER KARMEL: Mr. Malawsky, what do you think Mr. Dirks should have done at this time?

> MR. MALAWSKY [SEC Attorney]: As a matter of law, what should he have done?
>
> COMMISSIONER KARMEL: Yes.
>
> MR. MALAWSKY: Mr. Dirks could have—first of all, he should not have tipped what he should have done, potentially he could have done nothing. If he wanted to follow up the investigation, he certainly could have done that. And we are not complaining at all that he engaged in and embarked upon an investigation. We are not asserting that he had an obligation and a duty to report, although under the New York Stock Exchange rules at that time, if he did deem this a rumor, he should have reported it to the New York Stock Exchange. He had that duty and obligation.

Transcript of Proceedings on June 13, 1979, at 35.

2. We also deem it necessary to answer petitioner's assertion (Reply Br. 5-6 n.2) that the Commission "grossly misstate[d]" the Administrative Law Judge's findings regarding petitioner's selective dissemination of information relating to the Equity Funding fraud. There can be no doubt, as we stated on page 4 of our brief in opposition, that the Administrative Law Judge found that petitioner disclosed evidence of the fraud to institutional investors after first determining that they owned Equity Funding securities.[1] In

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[1] *See, e.g.*, [1978] Fed. Sec. L. Rep. (CCH) para. 81,707 at 80,823, 80,840 (Dirks identified The Boston Company Institutional Investors, Inc., as a "likely holder[] of EFCA securities" before relating to it the fraud); *id.* at 80,840-41 ("Prior to relating any of the Secrist allegations, Dirks first ascertained that Institutional Capital did then own EFCA stock"); *id.* at 80,844 ("After Alsop indicated that Fiduciary held substantial EFCA securities, Dirks * * * related to him the substance of the[] allegations of fraud * * *"); *id.* at 80,845 ("Dirks was aware at the time that Lawton had that morning purchased a substantial block of EFCA"); *id.* at 80,846 ("Dirks conveyed briefly to an analyst at Morgan Guaranty the allegations of fraud at EFCA after learning that Morgan Guaranty had an interest in EFCA").

the interest of brevity, the Commission included in its brief in opposition only one example in which petitioner either conveyed a "soft story" about accounting irregularities or nothing at all to certain investors. In fact, the Administrative Law Judge identified three such instances.

First, he found that on March 22, 1973, petitioner had a conversation with The Dreyfus Corporation in which he

> mentioned nonrecurring gains in EFCA earnings and two or three other matters that might reflect adversely on EFCA's management or its future prospects, but none of which involved reports of bogus insurance * * *.
>
> On March 23 * * * Dirks initiated [a] call to Dreyfus because he had ascertained in the interim through Vicker's publication or somehow that Dreyfus clients had EFCA holdings. Dirks now told [Dreyfus] * * * of [the] bogus insurance * * *.

[1978] Fed. Sec. L. Rep. (CCH) para. 81,705 at 80,832.

Second, on March 20 and 22, 1973, petitioner indicated to Tomlin, Zimmerman and Parmelee, Inc., "that he had questions about a possible change in accounting for dividends to participating policyholders * * * which could have inflated EFCA's 1972 earnings" but he made "no mention of fictitious insurance or of fraud at EFCA or any of its subsidiaries in the course of [his] conversation[s]." *Id.* at 80,835, 80,836.[2]

Finally, on March 26, 1973, petitioner "called Fidelity Management and Research in Boston, but he did not relate the allegations to them, because he learned they did not own

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[2]Although the Administrative Law Judge made no finding as to petitioner's reason for doing so, he found that petitioner eventually disclosed the truth to Tomlin, Zimmerman and Parmelee, Inc., on March 26, 1973. *Id.* at 80,836-38.

EFCA stock." *Id.* at 80,845. Petitioner argues (Reply Br. 5 n.2) that he did not disclose the fraud to Fidelity Management and Research "because they expressed no interest in the company and could not be expected to follow up on the allegations." He testified during the Commission's investigation, however, that Fidelity "didn't own stock so I really didn't give [it] the story" (R. 1151).

CONCLUSION

The petition for a writ of certiorari should be denied.*

Respectfully submitted.

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*The Solicitor General authorizes the filing of this brief.

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